

Honorable John C. Coughenour

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC.,

Plaintiff,

v.

KASPERSKY LAB, INC.,

Defendant.

No. C-07-0807-JCC

**DEFENDANT KASPERSKY
LAB'S RESPONSE TO THE
COURT'S MINUTE ORDER
OF JULY 31, 2007**

**RENOTED ON MOTION
CALENDAR: August 14, 2007**

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DEFENDANT KASPERSKY'S RESPONSE TO
MINUTE ORDER OF JULY 31, 2007
(C-07-0807-JCC) -- 0

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INTRODUCTION

In its Minute Order of July 31, 2007, the Court has requested that the parties brief the issue of whether the Kaspersky Internet security software communicates with a server via the Internet after the software has been downloaded and installed by Kaspersky's customers.

The answer is that once installed on an end user's computer, the Kaspersky Internet security software regularly reaches out to communicate with servers via the Internet, as often as every hour, to receive updates from Kaspersky Moscow's database of suspect code.

THE KASPERSKY INTERNET SECURITY SOFTWARE COMMUNICATES WITH A SERVER VIA THE INTERNET

After being downloaded and installed by Kaspersky's customers, the Kaspersky Internet security software products regularly reach out to communicate with online servers to receive updates from Kaspersky Moscow's database of suspect code. *See* Declaration of Stephen Orenberg at ¶ 3. Kaspersky Moscow maintains this database of suspect code on multiple online update servers worldwide. *Id.* at ¶¶ 4-5. After a customer installs the Kaspersky Internet security software, the software communicates via the Internet with the online update servers on a scheduled basis to update the software's version of the database of suspect code. *Id.* at ¶ 5. A customer may configure the Kaspersky Internet security software to communicate with the online update servers as often as once per hour. *Id.* Customers may also manually command their Kaspersky Internet security software to immediately communicate with the online update servers to update the software's database. *Id.* at ¶ 6.

Accordingly, in keeping with 47 U.S.C. § 230(f)(2), Kaspersky "provides or enables computer access by multiple users to a computer server" because Kaspersky customers regularly use their Kaspersky Internet security software to communicate with the online update servers via the Internet.

Kaspersky's update service is similar to a spam email blocking service provided by the defendant in *Pallorium, Inc. v. Jared*, No. G036124, 2007 WL 80955 (Cal. Ct. App. Jan 11,

1 2007) (finding Communications Decency Act § 230(c)(2)(B) immunity).¹ In *Pallorium*, the
2 defendant created an online data collection to block spam email, and third parties could
3 download the defendant's online data and use it to block spam email themselves. *Id.* at 1. The
4 court found that the defendant provided an "interactive computer service" that enabled
5 computer access by multiple users to a computer server because third parties could interact
6 with defendant's online data collection to determine what spam emails to block. *Id.* at 6.

7 Likewise, Kaspersky provides or enables computer access by multiple users to a
8 computer server because customers use the Kaspersky Internet security software to regularly
9 communicate with Kaspersky Moscow's online update servers via the Internet to download
10 Kaspersky Moscow's database and identify unwanted internet content.

11 Regularly updating the Kaspersky Internet security software is important because new
12 suspect code appears on the World Wide Web constantly. For example, Zango's own
13 practices still may still be causing problems for Internet users and may still violate the terms
14 of Zango's settlement with the Federal Trade Commission. *See* Orenberg Decl. at ¶ 7. Thus,
15 Kaspersky and other anti-malware companies must be free to advise customers about the
16 practices of Zango and similar companies so that customers can make informed choices about
17 their computer privacy and security.

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26 ¹ *Pallorium* is designated as not citable precedent in California tribunals. Given the scarcity of cases
27 interpreting § 230(c)(2), however, and given its factual similarity to this case, Kaspersky USA respectfully requests that the Court consider *Pallorium* as instructive or illustrative, if not controlling.

1 **CONCLUSION**

2 For these and the reasons stated in Kaspersky USA's previously filed motion
3 papers, Kaspersky USA respectfully requests that the Court dismiss the complaint or enter
4 summary judgment against Zango.

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7 DATED August 7, 2007.

DEFENDANT KASPERSKY LAB, INC.

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9 By /s/ Erik P. Belt

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CERTIFICATE OF SERVICE

I certify that on August 7, 2007, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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In addition, paper copies of the foregoing document will be mailed by United States Postal Service to non CM/ECF participants, if any.

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